No. 48.

Brief of Wickham for D. C.

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ENGELBERT MEYER, Plaintiff in Error,

VS.

THE CITY OF RICHMOND AND THE CHESAPEAKE AND OHIO RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

Brief for the Defendants in Error.

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vs.

THE CITY OF RICHMOND AND THE CHESAPEAKE AND OHIO RAILWAY COMPANY.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF FOR THE DEFENDANTS IN ERROR.

The city of Richmond is a municipal corporation duly incorporated under the laws of the State of Virginia. The charter of the said city will be found in the Acts of the General Assembly 1869–70, page 120, and the provisions of the charter of said city, so far as applicable to this case, are as follows:

Section 19, chapter 3, pages 123–4, provides that the council of the said city "shall likewise have power to make

such ordinances by laws and regulations as they may deem advisable to carry out the following powers which are hereby vested in them" and among the powers vested in said council in clause 7, page 124, is the power to "close or extend, widen or narrow, lay out and graduate, pave and otherwise improve streets and public alleys in the city * * * * they may build bridges in and culverts under said streets * * * *." Section 22, chapter 3, pages 127–8 provides that "the council shall not take or use any private property for streets or other public purposes without making to the owner or owners thereof just compensation for the same. But in all cases where the said city cannot by agreement obtain title to the ground necessary for such purposes, it shall be lawful for the said city to apply to and obtain from the Circuit or County Court of the county in which the land shall be situated, or to the proper court of the city having jurisdiction of such matters, if the subject lies within this city, for authority to condemn the same; which shall be applied for and proceeded with as provided by law." The general law of the State of Virginia in regard to the condemnation of property will be found in the Code of Virginia 1887, sections 1074 to 1084 inclusive, and said law has the provisions usual in such cases, viz: notice to the party whose land is to be condemned, appointment by the court of commissioners, who, after taking the prescribed oath, go upon the land and view the same; hear what evidence may be adduced, and make a return of their report in writing, under oath, to the court, on which the court hears the parties and gives judgment thereon as may appear right. These provisions of the general law form a part of every charter which carries with it the right of eminent domain. (See appendix).

The Chesapeake & Ohio Railway Company is the successor of the Richmond and Alleghany Railroad Company.

Eighth street is a street in the city of Richmond, and *begins* at Canal street and runs northwardly. Canal street runs

east and west, Seventh and Ninth streets are streets west and east, respectively, of Eight street and parallel thereto, and distant one square therefrom. Cary street is parallel to Canal street, and distant one square therefrom.

As appears from the declaration and plat therewith, pages 23 to 28 and page 32, the plaintiff is the owner of a lot with improvements thereon, situate at the southwest corner of Eighth and Cary streets, and not about the centre of the square, as stated in brief of counsel for appellant on page 15 thereof. The l cation of the property is shown by the declaration. Record, pages 23 to 28.

On the 28th of June, 1886, the council of the city of Richmond passed the ordinance involved in this case, which will be found set out at pages 29 to 31 of the record. From this ordinance it will be seen that the city of Richmond closed to the public such portion of Eighth street as lies between the southern boundary lines of the right of way of the James River and Kanawha Company, and a line drawn across Eighth street at right angles, sixty feet north of the face of the north wall of the canal, as the same stood on the 28th day of June, 1886, from and after the 31st day of August, 1886, until said city should re-open the same. Said ordinance required a bridge to be erected by the Richmond and Alleghany Railroad Company over the closed portion of said street, and it appears from the declaration in the case that this has been done. It further appears upon an examination of the declaration that this is an ordinary action of tort for damages, because of a nuisance erected in a highway by the defendants, which nuisance prevented the plaintiffs from reaching Canal street by way of Eighth street and from entering Eighth street from Canal street, except when travelling on foot, in which case the bridge above referred to is used. There is no charge in the declaration that the charter of the city of Richmond, or the ordinance passed by the council of said city was violative of any constitutional right of

the plaintiff, nor is it anywhere charged that the plaintiff was deprived of his property thereby, without due process of law, but the charge is that the defendants violated the duty of keeping Eighth street free from obstructions and in consequence thereof the plaintiff has sustained damage in the diminished value of his property and in the convenient use of the same. The court will see from the declaration and plat therewith, that there is no interference with the portion of Eighth street contiguous to plaintiff's property and that the sole effect of the closing of the portion of Eighth street involved in this inquiry is that persons (not on foot) desiring to go from Eighth and Cary to Canal and Seventh or Canal and Ninth streets, travel the north and west sides of the square bounded by Cary, Eighth, Canal and Seventh streets, instead of the east and south sides, and those desiring to go from Eighth and Cary to Ninth and Canal streets, travel the north and east sides of the square bounded by Cary and Ninth, Canal and Eighth streets, instead of the west and south sides.

The constitution of Virginia, so far as involved in this controversy, provides in article 5, section 14, that the General Assembly shall not pass "any law whereby private property shall be taken for public uses without just compensation."

The foregoing are all of the facts and such of the laws of Virginia as are necessary to a correct understanding of the case which the court is now asked to consider.

Argument.

When a litigant comes to this court complaining that he has been deprived of some right guaranteed him by the constitution of the United States, the first question presented to this court is whether the case as made by him in the court below properly raised a constitutional question, and, if it did, then whether the court below decided the constitutional

question against the plaintiff in error or whether the decision rendered by the court was such as necessarily involved a decision of the constitutional question adversely to the plaintiff. It is not sufficient that the constitutional question was raised, it must also appear from the record either that it was decided or that the decision rendered was such as necessarily decided the constitutional question.

The common-law system of pleading is retained in Virginia and under that as well as under any other proper system the court must look to the pleadings to find the grounds of recovery and the defences relied on. The declaration is the pleading which sets out the plaintiff's case, and must contain all of the grounds relied on for the recovery, and none other than those so set out can be considered by the court. The sufficiency of the grounds set out in the declaration are challenged and put in issue by the demurrer, and thus the only points on which the judgment of the court could be asked, are raised. The declaration shows that no point is therein raised which demanded the consideration by the court of any constitutional question. It is not sufficient that the charter of the city of Richmond and the ordinance, are made a part of the declaration. If it were intended to raise the question that the charter and ordinance were unconstitutional and in consequence thereof plaintiff was deprived of his property without due process of law the same should have been specially set up or claimed by apt language in the declaration so as to bring the question to the attention of the court when it had to pass on the demurrer. No charge is made in the declaration that the charter of the city of Richmond is in any way unconstitutional and void, nor is it anywhere therein alleged or claimed directly or by reasonable inference that the plaintiff was in any way deprived of his property without due process of law, but on the contrary it would seem from the declaration that the charter of said city is relied on as giving to the plaintiff the right which he charges has been violated, viz: the right to have Eighth street

in its entire length kept open and suitable for all kinds of travel, forever. *Hoyt* vs. *Shelden*, 1 Black 518. The court will see from the record, page 33, that the demurrer in this case was sustained, and the suit dismissed by the order entered on December 27, 1895, but in consequence of the representation made to the court that it was the intention of the plaintiff (page 34) to apply for an appeal to the Supreme Court of Appeals of Virginia in the case of H. Wythe Davis against the city of Richmond and the Chesapeake and Ohio Railway Company (which was a case tried at the same time and similar to this case and argued and decided with this case) the court took time to consider the motion of the plaintiff to set aside the said judgment and enter judgment for him on the said demurrer, and retained this case to await the result of the Davis case. The appeal in the Davis case being refused by the Court of Appeals and thereby the judgment of the Law and Equity Court of the city of Richmond being affirmed, on the 31st day of January, 1896, the Law and Equity Court refused to set aside its order entered December 27, 1895, and thereupon the plaintiff again moved the court to set aside and annul said judgment on the sole ground that the Act of the General Assemby of Virginia, approved May 24, 1870, providing a charter for the city of Richmond, (Acts 1869-'70, page 120), so far as it authorized the passage of the ordinance, in the declaration mentioned as well as said ordinance, is unconstitutional and void because in conflict with the Fourteenth Amendment of the Constitution of the United States, which prohibits any State from depriving any person of property without due process of law.

The case as made by the pleading and on which case alone the Law and Equity Court of the city of Richmond could pass, was a case in which the plaintiff relied on the charter to give him his right which he claimed was violated, how then was it possible in that state of the pleading to do aught but over-rule the motion, and in so doing no constitutional

question was passed on because no constitutional question had been properly made on the record, or in any other way, which no doubt was the reason of the lower court's judgment and that of the Supreme Court of Appeals of Virginia for sustaining the judgment of the lower court.

We have then the case of a plaintiff bringing an ordinary action of tort for damages to his property because of the breach of duty on the part of the defendant city in not keeping open a highway in accordance with its charter obligations; failing to sustain his case as made, and, after judgment against him on that case, moving to set said judgment aside, not because of any error in the judgment on the case as presented to the court, but solely on a ground, which to be considered by the court, would require it to decide a different case from that in the pleading before it. That no constitutional question was raised up to the entry of the order of December 27, 1895, is clear, else there would have been an appeal to this court in the H. Wythe Davis case; it is equally clear that the case as it then stood with no amendment or change in the pleading, could not be changed by the renewal of the motion to set aside the order of December 27, 1895, and enter judgment for the plaintiff on the demurrer because to do so would be to enter an order not warranted by the pleading in the case. The Court of Appeals of Virginia could only pass on the case decided by the lower court. It is equally clear that the motion to set aside the order of December 27, 1895, which was submitted on January 31, 1896, was an afterthought being in effect a motion to set the judgment aside in order to re-hear the case and under the circumstances such a motion should not stand in any better position than a petition for a re-hearing which, like a bill of review, rests on the sound discretion of the court, and it is well settled that "an attempt to raise, for the first time, a Federal question in a petition for re-hearing after judgment, comes too late."

Loeber vs. *Schroeder*, 149 U. S., page 580, see page 585 and cases cited.

It is clear that plaintiff's proper course if he wished to raise any such question as this was to have asked leave to amend his declaration which, at that stage of the case, is granted as a matter of course, and thus raised the constitutional question in the record. The reason given for a motion can never so change the case made by the pleadings as to require the court to consider and pass on a question so raised unless the pleading in the case was in such shape as to have properly submitted the question raised in the motion.

Grave and important constitutional questions cannot thus be raised and brought to this court and passed on, for to do so would put this court in the position of passing on questions never passed on or considered below.

Even if the court were to consider that the constitutional question was properly raised by the motion, the record does not show that it was passed on, nor was the judgment entered such that said question must have been necessarily decided adversely to the plaintiff in error, and such being the case, this court will not take jurisdiction. When the motion was made on January 31, 1896, the court had then to look to the pleading to see if any such question was fairly presented therein; not finding any such claim made in the declaration and having already decided the case as made, it declined to set aside its judgment, and in so doing, did not necessarily decide whether the charter of the city of Richmond and ordinance passed in pursuance thereof, was, or was not constitutional, but simply decided that such a question was not involved and had not been raised by the pleading. The court in the then condition of the record may well have over-ruled the motion for the reason that it could not entertain it with the pleadings in their then shape, and in so doing, passed on no constitutional question.

Steines vs. *Franklin County*, 14 Wall., 15.
Bolling vs. *Lersner*, 91 U. S., 594.
Brown vs. *Atwell*, 92 U. S, 327.

The case of *Railway Co* vs. *Chicago*, 166 U. S. 226, relied on by plaintiff in error to sustain the jurisdiction is not in conflict with the position of defendant in error. In the Chicago case it was the defendant in the court below who raised the constitutional question; under the statutory proceedings in that case there was no provision for an answer by the defendant and in view of the fact that there was no such provision, Mr. Justice Harlan held at page 231, "it is not *therefore* important that the defendant neither filed nor offered to file an answer specially setting up or claiming a right under the constitution of the United States." Suppose there had been a provision for an answer and the defendant had filed its answer and had nowhere therein made the claim that the statute under which the proceedings were being had was unconstitutional or that it was being deprived of its property without due process of law, would this court have hesitated to say that, not having raised the constitutional question in its answer, it was too late to undertake, in a motion to set aside the verdict of the jury, to raise the constitutional question in the shape of a reason for setting aside the verdict? The defendant if it had such a question and relied on it would have been required to set it up in its answer and no answer being provided for it was not important that the defendant did not volunteer to file an answer and raise the question. The only way in which such question could have been raised in this Chicago case was by the motion to set aside the verdict of the jury and grant a new trial upon the grounds set forth, to-wit: that the several rulings of the court in excluding proper evidence for the defendant, the statute under which the condemnation proceedings were instituted, and the verdict of the jury and the judgment based upon it, were all contrary to the fourteenth amendment.

The case under argument stands on a very different footing. Here the plaintiff in the court below attempts to raise the constitutional question as a reason why the judgment of the court on the case made by the plaintiff should be set aside and a rehearing allowed, claiming that the charter of the city of Richmond and ordinance of the council passed in pursuance thereof, violated the constitution of the United States; whereas in plaintiff's case as made by his declaration he made no such charge, but relied on the charter as giving him his right, making no claim that it was unconstitutional, but claiming that the obligations imposed by the charter had been violated and thereby damage had resulted to him; but no claim of being deprived of property is made therein. Having failed to raise the constitutional question in his declaration and taken his chances on the case as made, and failed, it was too late for him to undertake to raise it in the shape of a reason for setting aside the judgment on a case made by him selfthat did not involve any constitutional question. *

There is an independent ground of general law on which the court could have decided this case, without passing on the constitutionality of the charter and ordinance of the city of Richmond. The constitution prohibits any State from depriving any person of his property without due process of law. A State law therefore to be in violation of this provison of the constitution must contain two essential requisites;

1st. Its provisions must in some way deprive a person of his property, and

2d. It must fail to provide due process of law.

If it does not deprive a person of his property, whether due process of law is provided or not, makes no difference, the law is constitutional. If it does deprive a person of his property, but provides due process of law, the law is constitutional. It was not necessary for the court to pass on the

* See Kipley vs Illinois 170 U.S. p 182

constitutionality of the charter and ordinance in this case, because on looking to the case in the declaration, the court saw that no question of depriving a person of his property did or could arise. The entire claim was for *damages*, because the plaintiff was *deprived*, not of any property, but of a right which he enjoyed with the community at large, and enjoyed at the will of the legislature, to continue or take away as it might see fit, with or without compensation for any damage he might suffer, according as the legislature might think best for the interests of the community. In its action, the legislature is not controlled by any provision of either the State or Federal Constitution, so long as it does not deprive any one of property. There is a clear and marked distinction between "depriving" of property and "damaging" property. There is no difference in the meaning of the words, "take a man's property" and "deprive a man of his property." Each of the two latter expressions necessarily imports a direct action on the thing constituting the property. The word "damage" is much wider in its scope and meaning, and damage to property may arise not only in consequence of direct action on the thing constituting property, but from a multitude of acts not directly affecting the thing constituting the property. The case set out in the declaration was damage to property, not deprivation of property, hence the decision of the case did not necessarily involve the consideration or decision of the constitutional question. The case made in the declaration was damages for the diminished value of the premises and less convenient use and enjoyment of the same, and independent of the ordinance and charter, presented the question whether or not this was such a case of special damage, as would entitle plaintiff to recover. This question the court could have decided, without reference to the charter or ordinance. It is not every unauthorized obstruction of a street that will entitle an individual to maintain an action for damages. He must set forth and claim what the law denominates special damages, or damages peculiar to him-

self, growing out of the obstruction. The court could have held that the damages set out in the declaration did not come under the head of special or peculiar damages, and in so doing, would have passed on no constitutional question, and, whether it erred or did not err on this question of general law, its decision is not subject to review by this court. That the court was correct in holding that no special or peculiar damage was set out, is supported by the following authorities:

Rude vs. *City of St. Louis*, 93 Mo. 408.
Barnum etc. vs. *Minnesota etc. R. Co.* 33 Minn. 365.
Bigley vs. *Nunan and al.*, 53 Cal. 403.

For the foregoing reasons this case should be dismissed for want of jurisdiction.

If the court should reach the consideration of this case on the merits, the sole question it will have to consider is whether the plaintiff in error has been deprived of his *property* without due process of law. Examination of the charter of the city of Richmond, section 22, in connection with sections 1074 to 1084 Code of Virginia 1887, above referred to (see appendix), will show that so far as the provisions of the law go they duly provided for due process of law before an individual can be deprived of his property. It is not claimed in this case that there has been any actual or physical taking or invasion of the property of the plaintiff. The damage charged is purely consequential, which is held both by the United States Supreme Court and by the Virginia Court of Appeals not to be a taking or deprivation within the meaning of the constitutional provisions either of the State or of the United States.

In the case of *Smith* vs. *City Council of Alexandria*, reported in 33 Gratt., page 208, the court held that the council of the city of Alexandria had full power to change the grade of the street, and that so long as the power was properly exercised,

any damage resulting from the change in the grade would be *damnum absque injuria*, and, quoting from Second Dillon on Municipal Corporations, sections 782, 783, says: "The courts by numerous decisions in most of the States have settled the doctrine that municipal corporations acting under authority conferred by the Legislature to make and repair, or to grade, level and improve streets, *if they exercise reasonable care and skill in the performance of the work resolved upon* are not answerable to the adjoining owner whose lands are not actually taken, for consequential damages to his premises, unless there is a provision in the charter of the corporation or in some statute creating the liability."

The case of *Kehrer* vs. *City of Richmond*, 81 Va., page 745, was a case where Kehrer alleged that by reason of the erection of a bank in the street in front of his premises he was greatly damaged and injured in the following particulars:

1. That the plaintiff was obliged to keep and maintain a barrier to prevent the falling of earth from the street upon his premises.

2. That ingress and egress to and from his premises was rendered inconvenient and unsafe.

3. That the value of his property had been diminished.

4. That his business had been diminished.

5. That the flow of rain-water upon his premises caused damage, etc.

On a demurrer to the declaration the court held that a municipal corporation acting within the scope of its power and with reasonable care and skill in the opening, grading and improving its streets, is not liable to the adjoining owners *whose lands are not actually taken*, for consequential damages to his premises, unless there is a provision in the charter

of the corporation or in some statute creating the liability. And the court further says that this is the universal doctrine, except, perhaps, in the State of Ohio, and it might also have added in the State of Kentucky. It is not perceived that there is any difference in principle, so far as consequential damages is concerned, between closing a street and building in the closed part a bridge, and the alteration of the grade by an embankment, etc., in the street. The court further held in this case, page 750, "the result is that the declaration before us is fatally defective; the property of the plaintiff has not been taken whenever his rights are not unlawfully invaded. And if, in consequence of the acts complained of, he has been obliged, as he avers, to erect a barrier for the protection of his property, or steps in order to have ingress and egress to and from his premises, or if his business has been injuriously affected and the value of his property diminished, it is mere incidental injury caused by the prosecution in a lawful manner of a public improvement, for which there is no redress." The same principles have been recently laid down in the case of the *Home Building and Conveyance Company against The City of Roanoke*, 91 Va., page 52.

In the case of *Transportation Company* vs. *Chicago*, 99 U.S., 635, Mr. Justice Strong, at page 641, says: "The doctrine, however it may at times appear to be at variance with natural justice, rests upon the soundest legal reason. The State holds its highways in trust for the public, and improvements made by its directions, or by its authority, are its acts, and the ultimate responsibility, of course, should rest upon it. But it is a prerogative of the State to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing, if it does not protect the agents for improving highways which the State is compelled to employ. The remedy, therefore, for the consequential injury resulting from the State's action, through its agents, if there be any, must be that, and that only, which the Legis-

lature shall give. It does not exist at common law. The decisions to which we have referred, were made in view of Magna Charta and the restrictions to be found in the constitution of every State that private property shall not be taken for public use without just compensation being made, * * * * but acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the State or its agent, or give him any right of action. This is supported by immense weight of authority. Those who are curious to see the decisions, will find them collected in Cooley on Constitutional Limitations, page 542, and notes."

The constitution of Virginia differs from the constitutions of some of the States, as for example the present constitution of Illinois. The former constitution of Illinois provided that private property should not be taken for public use without just compensation. The present constitution of Illinois provides that private property shall not be taken *or damaged* for public use, without just compensation, and the court will observe that very different results are reached according to the varying provisions of the constitutions and this is the qualification alluded to in the *Kehrer case*, above referred to, when the court uses the language "unless there is a provision in the charter of the corporation or in some statute creating the liability."

A comparison of the case of *Transportation Company* vs. *Chicago*, 99 U. S., page 635, with the case of *Chicago* vs. *Taylor*, 125 U. S, page 161, will illustrate the different results reached in consequence of the addition of the words "or damaged" which amendment to the constitution of Illinois was made subsequent to the time the Transportation case originated, but prior to the origin of the Taylor case.

It would thus seem that, under the decisions of this court, the plaintiff has not been deprived of his property, and therefore that he has no cause of complaint, but it is contended that while the plaintiff's property has not been actually taken, yet that it has been damaged by the invasion of his rights, viz; the right to use the closed portion of Eighth street as a highway and that this right is the property of the plaintiff in consequence of his ownership of a lot fronting on a portion of the street not closed, of which he cannot be deprived without due process of law.

The interest of a lot owner in a street is of a two-fold nature. First, the right of passage along the street which he enjoys in common with the rest of the public and, second, rights peculiar to and growing out of his ownership of the lot and its location on the street, viz; the rights of light, air and access. To prevent confusion it is well to understand what is meant by the words so often used in cases of this kind, viz; "abutting property owners" and the word "access." Wherever the words "abutting property owners" are used in the discussion of questions arising out of the closing of a street, the court will see that the meaning of the word "abutting" is abutting on the portion of the street that is closed and in the same connection where the court finds the word "access" used, it will see from the context that it means the passage from the street on to the property involved, and not passage along the street to the portion of the same adjoining the property in question.

The right of passage which a lot owner enjoys along a street in common with the rest of the public is not property in such a sense as to entitle him to compensation on the discontinuance of the road or street. This is a right which he enjoys in common with other citizens of the Commonwealth, and of which the Legislature may deprive him without depriving him of any property. The inconvenience which he suffers is the same as that suffered by the rest of the community and for which he has no individual right of action.

Elliott on Roads and Streets, 526, 662.
24 Am. and Eng. Ency. of Law, p. 121.

The other rights of the lot owner in a street, viz, the rights of light, air and access are peculiar to him, and are not shared by him with the community at large. A municipal corporation, if the authority is given it by the Legislature, has a right to make any use of a street which it may see fit and the damage will be *damnum absque injuria* so far as the lot owner is concerned, provided no one of the rights peculiar to him as the owner of a lot is taken away. In this case none of the rights peculiar to this lot owner are interferred with. He has the same light, the same air and the same access to his property that he had before, and the only damage claimed to be suffered is that his property has diminished in value because he has not as convenient a way to and from Canal street. This may be true, but this damage he suffers in common with the rest of the community; it may also be true that this damage may be greater to him because of the fact that he is nearer to the closed portion of the street, but that is a difference in degree and not in kind, and to entitle him to recovery, the damage suffered must be different in kind and not simply in degree from that suffered by the rest of the community. The action of the city must in some way deprive him of one of the three peculiar rights growing out of the fact that he owns property abutting on the street.

Elliott on roads and streets, page 262–263.

In addition to the cases and text books already referred to, an examination of the following decisions of courts of last resort. will show that the foregoing principles are almost universally held to be correct:

The case of *Buhl* vs. *Fort Street Union Depot*, 98 Michigan, 596, was as follows:

The common council of the city of Detroit, vacated that portion of Fourth street extending from Congress street to Fort street, and the Fort street Union depot occupied the vacated portion of the street for depot purposes, under an amendment to the Union Depot act, authorizing any corporation organized under said act, with the consent of the common council of any city, etc., to occupy and close any highway, street or alley, within the limits of its station and depot grounds, requiring such company to pay to the parties entitled to the same, any and all damages that may accrue to them in consequence of the closing of any such highway, street or alley.

The property of the plaintiff did not abut on the closed portion of the street, and the damage he claimed, was that his property was made less accessible, and thereby diminished in value, it being necessary to make a detour to Third street instead of passing directly through what was formerly a part of Fourth street, so as to reach Congress street, and it was conceded that the value of his property had been diminished. The court held that the distinct question of whether the discontinuance of the public street, or its appropriation to other purposes than that of a highway, constitutes the taking of the property of the users generally, (other than abutting owners) has been distinctly ruled in the negative, referring to many decided cases on the subject. The court after citing and examining many decisions, comes to this conclusion, "we think the weight of authority in this country fully sustains the contentions of the defendant that such an injury as that resulting to the plaintiff here, is one which he suffers in common with the general public, and is *damnum absque injuria*." But it is contended by the plaintiff that unless the amendatory act is so construed as to give the plaintiff a right of action in the present case, the provision that damages may be recovered, is rendered wholly nugatory, as it is urged that only such streets as are within the depot ground are permitted to be vacated, and that there are no

abutting owners who could be injuriously affected by the closing of such streets And as applied to the present case, such is possibly the result of this construction. But the act is general and applies to all depot companies. The street which passes through the depot grounds may be a *cul de sac* and in such case the closing of a street might leave the owner of property without any means of egress whatever. In such case, undoubtedly, his right to damage would be as clear for the interruption of his means of ingress and egress as would be that of the abutting owner for a similar interference with a like right. The Circuit Court Judge directed a verdict for the defendant on the ground that the plaintiff was not entitled to recover any damage for the closing of the street in question. We think this conclusion was right and the judgment should be affirmed."

The case of *Glasgow and others* vs. *City of St. Louis and others*, 107. Mo. 198, decided by the Supreme Court of Missouri in 1891, was as follows:

providing

The city of St. Louis passed an ordinance ~~requiring~~ that so much of Papin street as lies between Twelfth and Thirteenth streets, is hereby vacated as a public street. It was charged in this case that there was a combination on the part of the officers and agents of the city with the Iron Company to wrong and injure the plaintiffs. The court held that there was no combination to injure anybody. The charter of the city of St. Louis was practically the same as the charter of the city of Richmond. The court held that there was no doubt that a property owner had an easement in a street upon which his property abuts which is special to him and should be protected, but in that case the plaintiffs owned no property fronting or abutting on the part of the street which was vacated. They were obliged to go a little further to reach Twelfth street, but that was an inconvenience different in degree only from that suffered by

all other persons, and it furnished no ground whatever for injunctive relief. Nor were the plaintiffs entitled to any relief by reason of the Constitution of Missouri which the court will observe is very different from the Virginia constitution, namely, "*that private property shall not be taken or damaged for public use without just compensation.*" The court held that to entitle plaintiffs to relief because their property was damaged, though not taken, they must show a special injury. There being no evidence of physical interference with their property, nor that any right or easement connected therewith or annexed thereto was affected, they suffered no injury which was special or peculiar to them. The city was there pursuing a power to vacate streets conferred upon it in express terms, and the court held that the principle was not affected in the least, by the fact that the Iron Company took possession of and used the portion of the street that was closed.

The case of *Stanwood* vs. *City of Malden*, 157 Mass., 17, was decided by the Supreme Court of Massachusetts, June, 1892, and was a case where suit was brought to recover damages for the discontinuance of a part of Summer street which ran obliquely into Florence street just opposite plaintiff's lands. The plaintiff's means of access to his property remained ample but its money value was diminished by diverting the travel away from his property through the closing of a part of Summer street. The court held, following a long line of Massachusetts decisions and quoting decisions from almost every other State, that there was no sufficient foundation laid for a claim for damage on account of the discontinuing of a highway, by showing that property had suffered by the diversion of travel or that the owner found travel less convenient, provided the access to and from his property was not interfered with.

The case of *State* vs. *City of Elizabeth*, 54 N. J. L., 462, was decided by the Supreme Court of New Jersey in June, 1892. In this case the Common Council vacated a portion of York

street in Elizabeth, New Jersey. The plaintiff owned land fronting on York street but it did not front on the portion of York street which was vacated. When York street was opened or extended her property had been assessed for benefits and the very portion of the street for which she had paid to have opened was closed, and closed for the benefit of an individual. From this statement it will be seen that this was a case that would appeal very strongly to the court, and yet without any dissent the court held that the action of the council in closing the street was justified under the charter of the city and the fact that the property of the plaintiff was diminished in value was no ground for recovery.

In addition to the cases that have been examined the court is referred to the following cases to support the proposition that when a part of the street is vacated, those whose property does not abut upon the vacated portion, and who have access to their property by the remaining portion of the street, cannot complain.

Pollak vs. *Trustees of San Francisco Orphan Asylum*, 48 Cal., 490.
East St. Louis vs. *O'Flynn*, 119 Ill., 200.
Dempsey vs. *Bullington*, 66 Iowa, 687.
Heller vs. *A. T. & S. F. Railroad Co.*, 28 Kansas, 625.
Castle vs. *County of Berkshire*, 11 Grey, 26.
People vs. *Supervisors*, 20 Mich., 95.
Petition of Concord, 50 N. H., 530.
Kings County Fire Insurance Company vs. *Stevens*, 101 N. Y., 411.
McGee's appeal, 114 Penn. St. 470.
Dantzer vs. *Ind. M. R. Co.*, 141 Ind., 604.

If the court will examine the autorities relied on by counsel for plaintiff in error in his brief, it will see that counsel has attributed a meaning to the words "abutting property owners," and the word "access," different from what the courts

intended, and it will find that no case is cited where it has been held that a plaintiff was entitled to damages, or that his property was taken when a portion of a street not adjacent to his lot was vacated, unless it be some English case, and the court will see that the doctrine in England is different from what it is generally in the United States, because of the English Statutes. See particularly what is said on this subject in the case above referred to of *Buhl* vs. *Fort Street Union Depot*, 98 Michigan, 596.

The case of *Rigney* vs. *Chicago*, 102 Illinois, page 64, relied on by plaintiff in error, is not a case in point, as there was no question of the closing of a small portion of a street involved. Furthermore, that case was decided by a divided court, a bare majority of the judges uniting in the opinion, and the Chief Justice who concurred in the general views expressed in the opinion, held that some expressions therein needed limitation. Furthermore the case turned on the language of the present Constitution of Illinois, which provides that "private property shall not be taken *or damaged* for public use without just compensation," and but for the change in the Constitution, the decision would have been the other way. The Constitution of Virginia, and of the United States, are the same as the former Constitution of Illinois.

The case of *City of Chicago* vs. *Union Building Association*, 102 Illinois, page 379, was a case of the closing of a portion of a street, and at page 393, the court adopts, as correct, the conclusions of Mr. Edmund H. Bennett as to cases of this kind, and holds:

"1. For any act obstructing a public and common right, no private action will lie for damages of the same kind as those sustained by the general public, although in a much greater degree than another.

"2. An action will lie for peculiar damages of a different kind, though even in the smallest degree.

"3. The damages, if really peculiar, need not always be direct and immediate, like the loss of a horse, but may be as remote and consequential as in other cases of tort.

"4. The fact that many others sustained injury of exactly the like kind is not a bar to individual actions in many cases of a public nuisance."

The case at bar clearly comes under the first head, viz: an obstruction of a public and common right to pass along Eighth street; and any damages suffered by the plaintiff in this case must be of the same kind as those sustained by the general public. It may be that his damages are greater, but they are necessarily of the same kind.

The case of *Chicago* vs. *Taylor*, 125 U. S., 161, reviews at length the Illinois cases prior and subseqnent to the adoption of the present constitution of Illinois, and particularly the *Rigney case*, and shows that the *Rigney case* differs from the previous decisions because of the addition to the constitution of the words "or damaged." Mr. Justice Harlan says at page 168:

"The use of the word 'damaged' in the clause providing for compensation to owners of private property, appropriated to public use, could have been with no other intention than that expressed by the State court. Such a change in the organic law of the State was not meaningless. But it would be meaningless if it should be adjudged that the constitution of 1870, gave no additional or greater security to private property, sought to be appropriated to public use, than was guaranteed by the former constitution."

It is respectfully submitted that no conclusion is reached by the court in *Dantzer* vs. *Ind. M. R. Co.*, 141 Indiana, 604, fav-

orable to the position taken by counsel for plaintiff in error. It is true that the court in the course of its opinion says: "that the obstruction of the easement of access, need not always be upon the front of the lot whose owner is affected, but that if the obstruction, though remote, renders access to such lot impossible or impairs it in a substantial manner at the point where it abuts upon the street, the property right of the lot owner is invaded and he may recover," but the conclusion reached by the court in the case is exactly the conclusion reached by the courts of all other States, with the exception, possibly, of Ohio and Kentucky, viz; that an obstruction in a public street under legislative authority, which merely compels the use of a more circuitous route to reach property abutting on the portion of the street not closed, does not give the property owner a right of action. The court reaches this conclusion after the examination of a large number of authorities including the case of *Pennsylvania Co.* vs. *Stanley*, 10 Indiana Appeal, 421, relied on by the plaintiff here. The *Stanley case* turned on the fact that the alley was only sixteen feet wide and the obstruction of one end of the alley created a *cul de sac* which having once entered, one could not get out of. That of course was the destruction of the alley as a means of access as complete as if the alley had been closed up at both ends. An examination of the facts in the *Dantzer case* will show that it is a case on all fours with the case now before the court.

Counsel for plaintiff in error suggests that there is a *cul de sac* in this case but unfortunately for his suggestion this is corner property fronting on Eighth street thirty-eight feet four inches and running back along Cary street for a distance of fifty feet, (record pages 14–15). Eighth street is sixty-five feet wide and Cary street sixty-five feet four inches wide (plat, record page 18). The suggestion then of a *cul de sac* in this case is not pertinent.

The case of *Johnson* vs. *The Old Colony Railroad Co.*, 18 Rhode Island, 642, also relied on by the plaintiff in error,

turned on the fact that the plaintiff had a private right of way in the street which was closed, as distinguished from the mere right of passage enjoyed by the public generally.

The case of *Eachus* vs. *Los Angelles Railway Co.*, 103 California, 617, also relied on by the plaintiff in error is not in point because the court will see that the street immediately in front of the plaintiff's lot was occupied by a depot company for the purpose of a railroad so as to prevent access from the street on to the lot of the plaintiff.

The case of *Stetson* vs. *Faxon*, 19 Pick., 147, was a Massachusetts case decided in 1837, and seems to be very much relied on by counsel for the plaintiff in error. Why he should have selected a case decided in 1837, when the Massachusetts reports are filled with many later decisions, one of the latest of which is *Stanwood* vs. *City of Malden*, above referred to, is difficult to see. If it is in conflict with the later decisions, then it is an overruled case and can have but little weight. So far from *Stetson* vs. *Faxon* supporting the position of counsel for the plaintiff in error, it is a direct authority in support of the law as contended for by counsel for the defendants in error. The plaintiff owned a warehouse facing southerly on a way which had been used and recognized by the city of Boston as a street for more than sixty years. The city laid out a new street just to the south of this ancient one, and thereafter sold to the defendant, who also had a warehouse to the east of the plaintiff's, and separated therefrom by a narrow alley and facing the ancient way, the fee in this ancient way in front of his warehouse to the north line of the new street. The defendant then proceeded to erect a warehouse on his original lot and extending over that portion of the ancient way bought by him from the city. The plaintiff brought his action for damages because this new structure extended beyond the plaintiff's building thirty-six feet, obscuring and darkening the plaintiff's warehouse and obstructing the free communication therewith, and blocking the alley, etc., there was a verdict for the plaintiff for $4,010.12.

The court held that they were satisfied from the evidence that the place where the plaintiff's warehouse was erected, was a public highway by prescription, and the *evidence does not show that it has been legally discontinued*. The court held further that the sale of the land by the city to the defendant would pass the estate if the city owned it, which was not decided, but it would be subject to the public easement and a building erected thereon would be a public nuisance, notwithstanding the deed from the city. That the making and the paving of the new street by the city near the old one did not amount to a discontinuance of the ancient way. This case then is simply the case of an individual obstructing the highway, causing special damage (deprivation of light, air and access) to another individual, for which he has a right of action. In the case under consideration, the city of Richmond had closed the highway without causing special damage to plaintiff, and there being no highway, it makes no difference to the plaintiff what structures were erected in the closed portion nor what use the closed portion was put to, the motives actuating the council of the city of Richmond cannot be enquired into.

The case of *Bentley* vs. *City of Atlanta*, 92 Ga. 623, cited by counsel for the plaintiff is not a parallel case to the one under argument. The Bentley case was not a case where a street was closed, but from the statements made in the declaration the city of Atlanta had put the street in such a condition that persons using the street were unable to pull up the grade and their wagons backed against and into the house of the plaintiff, one special cause of damage being that one of the city carts loaded with garbage and refuse matter of every kind, being unable to pull up the grade, backed and dumped the contents of the cart into the plaintiffs dining room, thereby frightening and insulting his family, and various other similar causes of complaint were set forth in the declaration. The court evidently considered that the plaintiff in his declaration had made out a case of nuisance,

kept and maintained in a street by the city of Atlanta, and this was the only legal point decided. Surely this cannot be considered as parallel to a case where a city, acting strictly in accordance with the powers conferred on it by the Legislature, when in the opinion of its council, whose action cannot be reviewed by the court, nor can their reasons therefor be gone into by the court, closes a street and certain erections are made in the closed portion thereof.

The New York cases relied on by plaintiff in error are simply cases in which the right of access, light or air had been impaired, which of course could not be taken without compensation.

The case of *Balt. & Pot. R. R. Co.*, vs. *Fifth B. Ch.*, 108 U. S., 317, is not in point as is shown by the quotation therefrom in brief of counsel for plaintiff in error. It was the simple case of a nuisance created by a person on his own premises causing special damage to his neighbor. The court says:

"The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams or matters in which the public have an interest and over which the public have control."

The case of *Pumpelly* vs. *Green Bay Co.*, 13 Wall., 166, was a case where property was practically taken. Mr. Justice Strong speaking for the court in *Transportation Co.* vs. *Chicago*, 99 U. S., p. 635, says at page 642:

"The extremest qualification of the doctrine is to be found, perhaps in *Pumpelly* vs. *Green Bay Co.*, 13 Wall., 166. * * * * In those cases it was held that permanent flooding of private property may be regarded as a taking. In those cases there was a physical invasion of the real estate of the private owner and a practical ouster of his possession."

Plaintiff in error contends that the ordinance shows that

there was a covert effort to divert a public street to a private use, and that the city violated its duty imposed by its charter to prevent the encumbering of street etc., in any manner whatever; but this contention is not pertinent because the reasons and the necessity for closing a street rest in the discretion of the city council and are not the subject of review by the courts. The city is also equally charged with the duty of closing streets, whenever in the judgment of its council, the public good requires this to be done; and if it were proper to go into the discussion, there would be no difficulty in showing a most urgent necessity that the council of the city of Richmond should have done exactly what it did do. That no one is in truth and in fact damaged by what it did do, is very naturally to be inferred when it is considered that it took this plaintiff some ten years to find out that his *property* had been taken from him without due process of law, and even his learned counsel does not seem to have been aware of this deprivation until he had failed to win the case as he at first conceived it to be.

It will thus be seen that no case has been cited, and it is respectfully submitted that no case can be cited, similar to the case at bar, where a plaintiff has been held entitled to damages for the closing of a portion of a street by legislative authority, when the closing of the street does not interfere with the access to plaintiff's property by the remaining portion of the street and the other streets adjoining plaintiff's property. To do so would necessarily require the court to hold that the right of passage along a street enjoyed by the public generally, was a right of property which could not be taken without compensation made therefor, and it has never been claimed that the right to the use of a highway is the individual property of each person who may desire to use said highway. As before shown the closing of the end of Eighth street simply prevents this plaintiff from travelling along Eighth street from his property into Canal steeet. This is the sole right that is taken from him and this right he enjoys in com-

mon with the rest of the community, and any damage that he may suffer in consequence of being deprived of this right, is of the same kind as that suffered by the rest of the community and is necessarily *damnum absque injuria*. It makes no difference that his damages for the deprivation of this right are greater than that of a person on Eighth street one block or ten blocks further off, because to entitle him to recover he must show that his damage differs in kind and not in degree.

For the foregoing reasons it is respectfully submitted that the judgment of the Supreme Court of Appeals of Virginia is right and should be affirmed.

H. T. WICKHAM,

HENRY TAYLOR, JR.

For the Chesapeake & Ohio Ry. Co.

APPENDIX.

Extracts from the charter of the city of Richmond.

Virginia Acts of Assembly, 1869--70, pp. 120--146.

SECTION 19. The city council shall have, subject to the provisions herein contained, the control and management of the fiscal and municipal affairs of the city and of all property, real and personal belonging to the said city; and may make such ordinances, orders and by laws, relating to the same, as it shall deem proper and necessary. They shall likewise have the power to make such ordinances, by-laws, orders and regulations as they may deem desirable to carry out the following powers which are hereby vested in them:

* * * * * * * * *

VII. To close or extend, widen or narrow, lay out and graduate, pave and otherwise improve streets and public alleys in the city, and have them properly lighted and kept in good order; and they shall have over any street or alley in the city, which has been or may be ceded to the city, like authority as over other streets or alleys. They may build bridges in, and culverts under said streets, and may prevent or remove any structure, obstruction or encroachment over or under, or in a street or alley, or any sidewalk thereof, and may have shade trees planted along the said streets; and no company shall occupy with its work, the streets of the city, without the consent of the council. In the meantime no order shall be made and no in-

junction shall be awarded, by any court or judge, to stay the proceedings of the city in the prosecution of their works, unless it be manifest that they, their officers, agents or servants are transcending the authority given them by this act, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages.

* * * * * * * * *

SECTION 22. The council shall not take or use any private property for streets or other public purpose without making to the owner or owners thereof just compensation for the same. But in all cases where the said city cannot by agreement obtain title to the ground necessary for such purposes, it shall be lawful for the said city to apply to and obtain from the Circuit or County Court of the county in which the land shall be situated, or to the proper court of the city having jurisdiction of such matters, if the subject lies within this city, for authority to condemn the same; which shall be applied for and proceeded with as provided by law.

LAW OF VIRGINIA IN REGARD TO CONDEMNATION OF PROPERTY.

Code of 1887, Sections 1074 to 1084 inclusive.

SEC. 1074. *Commissioners to ascertain value of land, where it cannot be agreed on*.—If the president and directors of a company incorporated for a work of internal improvement, the court of a county, the council of a city or town; the Institution for the Deaf and Dumb and the Blind, or any of the State lunatic asylums cannot agree on the terms of purchase with those entitled to lands wanted for the purpose of such company, county, city, town, institution or asylum, five disinterested freeholders (any three of whom may act), shall be appointed by the court of the county

or corporation in which such land, or the greater part thereof, lies, for the purpose of ascertaining a just compensation for such land.

SEC. 1075. *Notice to be given of application for their appointment.*—When it is intended to apply for such appointment, ten days' previous notice thereof shall be served on the tenant of the freehold, or his guardian or committee. If there be no such tenant, guardian or committee, within the county or corporation, the notice instead of being thus served may be published once a week for four successive weeks, in some convenient paper and posted at the front door of the court-house of the county or corporation, on the first day of the term next preceding the application.

SEC. 1076. *Their appointment.*—Upon its appearing that such notice has been so given, the court shall appoint such commissioners, and in the order appointing them shall designate the day for them to meet. Any one or more of them attending on the land may adjourn from time to time until the business shall be finished.

SEC. 1077. *Their oath.*—Before executing their duties they shall take an oath, which shall be certified in substance as follows: " county (or corporation), to-wit: I, a justice for the said county (or corporation), do certify, that , have this day made oath before me, that they will faithfully and impartially ascertain what will be a just compensation for such of the land of the freehold, whereof is tenant, as is proposed to be taken by the company (or the town, city, or county of , or the Institution for the Deaf and Dumb and the Blind, or any of the lunatic asylums) for their purposes, and will truly certify the same. Given under my hand this day of ."

SEC. 1078. *Their duty and the report they shall make.*—The commissioners, after viewing the land and hearing such proper evidence as either party may offer, shall ascertain what will be a just compensation for the said land and for the damage to the residue of the tract, beyond the peculiar benefits to be derived in respect to such residue, from the work to be constructed, and shall make a report to the following effect: "We, , appointed by the county (or corporation) court of , by its order of the day of , to ascertain what will be a just compensation for such part of the land of the freehold whereof is tenant, as is proposed to be taken by the company (or the town, city or county of , or the Institution for the Deaf and Dumb and the Blind, or of any of the lunatic asylums), for their purposes, do certify, that on day of , the day designated in the said order (or the day to which we were regularly adjourned from the day designated in the said order), we met together on the said part of the land, the limits of which part were then and there described to us as follows, to-wit: (Here set forth the width and length of the particular part, and describe the same in such manner as to make it reasonably certain.) And after being first duly sworn, upon a view of the part aforesaid, and upon such evidence as was before us, we are of opinion and do ascertain that for the said part, and for the damage to the residue of the tract beyond the peculiar benefits to be derived in respect to such residue from the work to be constructed, will be a just compensation. Given under our hands this day of ."

SEC. 1079. *Proceedings of court on report; how title to land vested.*—The said report and the certificate of the justice shall be forthwith returned to the court of the county or corporation; and

unless good cause be shown against the report, the same shall be confirmed and recorded. The sum so ascertained to be a just compensation may be paid to the person entitled thereto or into court. Upon such payment, the title to that part of the land for which such compensation is allowed shall be absolutely vested in the company, county, city, town, institution or asylum, in fee-simple, except in the case of a turnpike company where a sufficient right of way only for the purposes of such company shall be vested.

SEC. 1080. *When new commissioners appointed.*—If, however, good cause be shown against the report or if the commissioners report their disagreement, or if they fail to report within a reasonable time, the court may, without further notice, as often as seems to it proper, appoint other commissioners; and the matter may be proceeded in as before prescribed.

SEC. 1081. *Corporation on paying damages may proceed with work; no injunction to be awarded.*—Whether any such new appointment be made or not, the company, county, city, town, institution or asylum, on paying into court the sum ascertain by the previous report, may, notwithstanding the pendency of proceedings, enter into and construct their work upon or through that part of the land described in such previous report. And no other shall be made nor any injunction awarded by any court or judge to stay the proceedings of the company, county, city, town institution or asylum, in the prosecution of their work, unless it be manifest that they, their officers, agents or servants are transcending their authority and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages.

SEC. 1082. *Judgment on subsequent report.* When, after such payment into court, a report is made which is confirmed if the sum thereby ascer-

tained exceed what was so paid, judgment shall be given against the company, county, city, town, institution or asylum, for the amount of such excess; and if what was so paid exceed the sum ascertained by the second report, the excess shall be paid back to the company, county, city, town, institution or asylum. If the sum ascertained by the report which is confirmed be not more than the sum ascertained by the first report, the party applying for the appointment of other commissioners shall pay the costs occasioned by such application, unless the original report was set aside on some other ground than that of insufficiency of compensation.

SEC. 1083. *Effect of judgment and payment thereof.*—The company, county, city, town, institution or asylum, when such judgment is rendered against it shall thereafter have no right to possession of the land until the judgment is satisfied. From the time of such satisfaction by the payment of the money to the persons entitled thereto, or into court, or from the time of the confirmation of the subsequent report, if no additional compensation be thereby ascertained, or from the time of the termination of the proceedings, if they be determined without such confirmation, the title to the land shall be absolutely vested in the company, county, city, town, institution or asylum, in fee-simple.

SEC. 1084. *How the money disposed of when paid into court.*—To enable the court to dispose properly of any money so paid into court, it may have inquiries by a commissioner to ascertain what persons are entitled thereto, and in what proportions; and may make an order of publication, requiring all interested to appear before the commissioner that their respective claims may be passed upon. After such reference to a commissioner, and such publication, the court shall make such disposition of the money so paid into court as may seem to it right.